

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Petition for Declaratory Ruling to the Iowa)	WC Docket No. 09-152
Utilities Board and Contingent Petition for)	
Preemption)	

REPLY COMMENTS OF QWEST COMMUNICATIONS COMPANY, LLC

Qwest Communications Company, LLC (Qwest) hereby files these Reply Comments in the above-captioned docket. As discussed below, Great Lakes Communications Corp. and Superior Telephone Cooperative (Great Lakes) ask the Commission to preempt action by the Iowa Utilities Board that never occurred. While the Order issued by the Board has important precedential and analytical effects in proceedings pending before this Commission and in other forums, it falls well within the scope of the Board's jurisdiction.¹ But Great Lakes has not even attacked the actual Order, and its Petition is thereby fatally deficient on its face. The Commission should therefore dismiss Great Lakes' Petition.

On August 20, 2009, Great Lakes filed a Petition with the Commission requesting that the Commission "preempt" an anticipated but unreleased order of the Iowa Utilities Board. Great Lakes requested preemption based on its characterization of the Board's open meeting (and indeed was apparently filed during the meeting) and its mischaracterizations of some of Qwest's advocacy before the Board. As Qwest and others² pointed out in initial comments filed

¹ The Board's Order quite clearly and specifically regulates only intrastate telecommunications services. State of Iowa Dept. of Commerce Utilities Board, Docket No. FCU-07-2, Final Order, Sept. 21, 2009 at 12-15.

² See Opposition of Verizon and Verizon Wireless, WC Docket No. 09-152, Sept. 21, 2009 at 3-7; Opposition of Sprint Communications Company LP, WC Docket No. 09-152, Sept. 21, 2009

September 21, 2009, Great Lakes' Petition is fatally untimely, essentially requesting that the Commission preempt significant aspects of state regulation of intrastate telecommunications service based solely on speculation.

On September 21, 2009, the Iowa Utilities Board filed its own comments on the Petition. As the Board documented, the order that Great Lakes speculated would explicitly regulate interstate telecommunications is instead “focused solely on issues related to *intrastate* access charges.”³ As the Board points out, not only was the Petition premature, but petitioners “complain in the Petition about rulings that the Board did not make. . .”⁴ Concerning the underlying assumption in the Petition, echoed by some of the supporting commentators, that Qwest’s advocacy would control the Board’s deliberations, the Board noted that “[i]n many cases, it appears the Petitioners may have mis-read Qwest’s various requests for relief, assuming that if the request was not specifically limited to intrastate access charges then Qwest must be asking the Board to interfere with interstate matters.”⁵ In any event, as the Board observed, “the Board rejected most, if not all, of those requests for relief (assuming Qwest actually asked for relief in the manner described by the Petitioners.)”⁶ In other words, Great Lakes’ preemption requests have no resemblance to the order actually issued by the Board, and are premised upon

at 1-2, 6-7; AT&T Inc.’s Opposition to Petition for Declaratory Ruling, WC Docket No. 09-152, Sept. 21, 2009 at 1-2, 5.

³ Comments of the Iowa Utilities Board, WC Docket No. 09-152, Sept. 21, 2009 at 2 (emphasis in original).

⁴ *Id.*

⁵ *Id.* at 4 n.2.

⁶ *Id.* at 4 (note omitted here, but referred to previously).

imagined actions that the Iowa Utilities Board has not taken. The Board's comments are accurate: "the Petition is without basis and a waste of resources."⁷

The Iowa Order has now been released, and the Order clearly and specifically deals only with intrastate telecommunications and intrastate traffic pumping.⁸ Given what the Order actually says, the comments supporting the Petition not only continue to attack a fictitious order, but illustrate dramatically why a preemption petition based on speculation about a non-existent order should not be countenanced. For example, Northern Valley Communications spends most of its supportive comments claiming that it cannot tell whether the Order, once released, would limit its tariff rulings to intrastate access.⁹ In its Order, the Iowa Board dispelled this speculation, explicitly limiting its analysis to the intrastate application of the language in the Iowa LECs' tariffs.¹⁰

Other commentators ask the Commission to overturn the Board's Order based on arguments having no relation to whether the Board exceeded its jurisdiction, such as: 1) whether particular carriers or providers are "end users";¹¹ 2) whether IXC's should be directed as part of

⁷ *Id.* at 2.

⁸ The Iowa Final Order was submitted on the record in this proceeding by Qwest via an *ex parte* presentation filed September 21, 2009. See Letter from Robert B. McKenna to Marlene H. Dortch, WC Docket No. 09-152, Sept. 21, 2009. The Order repeatedly emphasizes that it deals only with intrastate traffic pumping. See Final Order at 12-15, 17-18, 24, 35-36, 37-38, 42-43, 49, 53-54, 57 (and n.22), 61, 62-63, 67-69, 77-78.

⁹ Northern Valley, etc., at 5-11; All American at 9. See Comments of Adventure Communications Technology, LLC at 17 ("The uncritical adoption of Qwest's proposed findings of fact and conclusions of law, the broad dismissal of federal precedent supportive of the LECs' positions, and the transgression of its obvious jurisdictional limitations are all signs of 'regulatory capture.' The IUB's adopted findings establish patently bad law and patently bad public policy.").

¹⁰ Iowa Final Order at 18.

¹¹ Beehive at 4; Futurephone at 6.

the preemption proceeding to pay ILECs for artificially pumped traffic,¹² and even 3) whether any decision in the pending rulemaking on traffic pumping should be prospective-only or retrospective.¹³ Several commentators claim that the Iowa Order should be preempted because it failed to give general applicability to the initial FCC's *Farmers and Merchants* decision,¹⁴ despite the Commission expressly rejecting this position and stating that no such general applicability is warranted even at the federal level.¹⁵ One commentator claims that the Commission should preempt the Iowa action because the Board was "biased" and the acting Chair of the Board should have recused herself from the proceedings.¹⁶ In an *ex parte* presentation ostensibly based on a one-page *ex parte* filing by Qwest, Great Lakes posits as one reason for grant of the petition the claim that: "The Final Order simply fails to address the arguments and evidence presented by Petitioner, including admissions by Qwest that should have been fatal to Qwest's complaint."¹⁷

This is all pointless. The Iowa Board carefully limited its decision to intrastate traffic, intrastate tariffs, state certifications and the application of Iowa law.¹⁸ Intrastate traffic pumping is clearly within the jurisdiction of the Iowa Utilities Board, and the Board in its Order was careful to limit its decision to such matters. Most significantly in terms of this proceeding, the Petition simply got it wrong when it speculated as to what the Order would say. This utterly

¹² Adventure at 9-10; Futurephone at 7-8; Northern Valley at 17-21.

¹³ Letter Filing by Jonathan E. Canis and "CEOs of 20 different companies" at 7.

¹⁴ Adventure at 13-15; Northern Valley at 14-16.

¹⁵ *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, 23 FCC Rcd 10731, 10734 ¶ 8 (2008).

¹⁶ Adventure at 17-19.

¹⁷ Letter from Ross A. Buntrock to Marlene Dortch, WC Docket No. 09-152, Sept. 28, 2009 at 3 (citation omitted).

¹⁸ See note 8, *supra*.

critical failing led to the preposterous comments “supporting” preemption. The Petition attacks the wrong order, a phantom order that was never issued. It would make no sense to now speculate how Great Lakes and others might challenge the actual Order of the Iowa Utilities Board -- or even whether they would choose to do so.¹⁹ In all events, no such petition or challenge has been filed, and there is in essence nothing to respond to.

Moreover, it is now self evident that Great Lakes’ basic argument -- that any state regulation of intrastate telecommunications that affects interstate telecommunications should or can be preempted, is simply wrong. The jurisdictional issues that arise in the case of jointly used telecommunications plant are complex and subtle. But clearly mere “impingement” on interstate telecommunications matters by a state regulator in the course of carrying out its own statutory responsibilities over intrastate telecommunications is not, by itself, a sufficient basis on which to predicate federal preemption.²⁰

¹⁹ Great Lakes makes some effort to address the Order itself in a Motion for Stay that it filed on October 1, 2009. This filing confirms that there is no basis upon which the FCC could justify preempting any aspect of the Iowa Order, and will be addressed separately. Suffice it to say that the Stay Motion is not a valid substitute for a legally sufficient petition.

²⁰ *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 373-79 (1986).

The pending Petition must be dismissed on the basis that the factual predicate on which it requests preemption does not exist. The Petition was filed prematurely, and the result is that it presents no basis for analysis, far less grant. Moreover, the Board's subsequent issuance of the Iowa Order has confirmed that the Board acted well within the scope of its jurisdiction.

Respectfully submitted,

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October 6, 2009

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY**
COMMENTS OF QWEST COMMUNICATIONS COMPANY, LLC to be 1) filed via
ECFS with the Office of the Secretary of the FCC; 2) served via e-mail on Mr. Doug Slotten and
Ms. Lynne Hewitt Engledow of the Competition Policy Division of the Wireline Competition
Bureau of the FCC at douglas.slotten@fcc.gov and lynne.engledow@fcc.gov; 3) served via
email on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com;
and 4) served via First Class United States Mail, postage prepaid, on the parties listed on the
attached service list.

/s/ Richard Grozier

October 6, 2009

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